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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Board is amending its rules of practice and procedure to rescind its rule requiring dismissal of an agency's petition for review of an administrative judge's initial decision where the agency inadvertently exceeds the requirements of the judge's interim relief order. The Board will no longer dismiss the agency's petition in such a circumstance where its action was taken in good faith. The Board announced the rescission of this rule in *Silvana H. Moscato v. Department of Education*, issued November 12, 1996, and suspended the application of the rule effective from that date.

EFFECTIVE DATE: August 15, 1997.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, 202-653-7200.

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 7701(b)(2), an appellant who prevails in an appeal to the Board is entitled to the relief provided in the administrative judge's initial decision pending the outcome of any petition for review by the Board. This interim relief is to be provided effective from the date of the initial decision. Interim relief is not provided if the judge determines that it is not appropriate or if the initial decision requires the appellant's return to or presence at the workplace and the agency determines that such return or presence would be unduly disruptive. This interim relief provision was added to Title 5 of the United States Code by the Whistleblower Protection Act of 1989 (Pub. L. 101-12).

Some Federal agencies attempting to comply with an initial decision providing interim relief have cancelled the personnel action that the appellant appealed and have furnished evidence of that cancellation when filing a petition for review. From the time the interim relief provision took effect in July 1989 until November 1996, the Board consistently held that, where an agency exceeds the order for interim relief by cancelling the appealed action and thus providing final relief, the matter is effectively removed from controversy, and the agency's petition for review is rendered moot. See, e.g., *Edney v. Department of the Treasury*, 56 M.S.P.R. 248, 249-50 (1993). On June 16, 1994, the Board amended its rules of practice and procedure at 5 CFR 1201.115(b)(1) to incorporate this holding in its procedural regulations. 59 FR 30863.

In November 1996, the Board considered this issue further in its adjudication of *Silvana H. Moscato v. Department of Education*, 72 M.S.P.R. 266 (1996). In its decision in that case, the Board cited a number of appellate court decisions that declined to dismiss a case as moot even where one of the parties apparently provided relief or complied with a judgment, if the party did not intend to forego further legal proceedings. *Id.* at 6-8. In announcing its decision that it will no longer automatically dismiss an agency's petition for review as moot where the agency has inadvertently and in good faith exceeded an interim relief order, the Board stated: "We find that the Board and prudent policy are ill-served by such an automatic dismissal, where the agency attempted to comply with an order of interim relief, mistakenly exceeded the Board's requirements, did not abandon its intent to go forward, and then took steps to correct its mistake in a timely manner." *Id.* at 6.

In its decision in *Moscato*, the Board announced that it was suspending the application of the last sentence of 5 CFR 1201.115(b)(1), which required automatic dismissal of an agency's petition for review where it exceeded the requirements of an interim relief order. *Id.* at 9. The Board further stated that it would apply the new rule announced in its decision, i.e., that it would no longer dismiss an agency's petition as moot under these circumstances, in all cases relating to

the regulation at 5 CFR 1201.115(b)(1) and that it would amend its regulations to reflect the new rule. *Id.* The notice the Board publishes today makes that amendment.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board amends 5 CFR part 1201 as follows:

PART 1201—[AMENDED]

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

§ 1201.115 [Amended]

2. Section 1201.115 is amended at paragraph (b)(1) by removing the last sentence.

Dated: August 11, 1997.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 97-21647 Filed 8-14-97; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 318

[Docket No. 95-038DF]

RIN 0583-AB97

Use of Glycerine as a Humectant in Shelf Stable Meat Snacks

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Direct final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) will permit the use of glycerine as a humectant in shelf stable meat snacks at a level not to exceed 2 percent of the formulation weight of the product. This action is being taken in response to a petition from the American Association of Meat Processors requesting use of glycerine to promote moisture retention and distribution and improved texture of shelf stable meat snacks.

DATES: This rule will be effective on October 14, 1997 unless adverse or